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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 489

KIRK MANUFACTURING COMPANY,
*Petitioner,*

vs.

CALDWELL MANUFACTURING COMPANY and
ROBERT E. CALDWELL,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI.

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## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your Petitioner, Kirk Manufacturing Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit holding invalid for lack of invention Letters Patent 2,581,028, issued to William M. Kirk on January 1, 1952. The opinion of the Court of Appeals is as yet unreported, a copy being appended hereto (Appendix A). The opinion of the

District Court for the District of Nebraska (R. 21-43)* which upheld the validity of the patent, is reported at 163 F. Supp. 157.

## JURISDICTION.

The judgment of the Court of Appeals was entered on August 13, 1959.

This Court has jurisdiction under Title 28, United States Code, Sections 1254, sub-paragraph (1), and 2101, sub-section (c).

A certified transcript of the record in the case, including the proceedings in the Court of Appeals, is furnished herewith in compliance with Rule 21 of this Court.

## QUESTIONS PRESENTED FOR REVIEW.

1. Was it in accordance with the applicable patent statutes and prior decisions of this Court for the Court of Appeals, in passing upon validity, to disregard the express language of claims 1, 7, 11, 17 and 19 of patent 2,581,028, with the result that the "patent" found invalid was one neither claimed by the patentee nor granted by the Patent Office?

2. Did the Court of Appeals, in assessing the question of invention on the basis of a completely erroneous concept of the subject matter protected by the patent, correctly apply the patent law as declared by this Court and the pertinent Acts of Congress?

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*As the Record of Respondents in the Court below was supplemented by a separate Supplemental Record, the designates R. and SR. are used to distinguish between the two.

3. In the light of Title 35, United States Code, Section 103, did the Circuit Court of Appeals employ a proper test of invention in reversing the District Court's finding of validity?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provision relied upon is Article 1, Section 8. The statutes involved are Title 35, United States Code, Sections 101 (66 Stat. 797), 102 (66 Stat. 797), 103 (66 Stat. 798), 112 (66 Stat. 798), 154 (66 Stat. 804), and 282 (66 Stat. 812). Pertinent parts are reproduced at Appendix B.

## STATEMENT OF THE CASE.

This is an action for infringement of claims 1, 7, 11, 17 and 19 of United States Letters Patent 2,581,028 brought by the petitioner, Kirk Manufacturing Company (owner by assignment of the patent) against respondents Robert E. Caldwell and Caldwell Manufacturing Company. The action was instituted in the United States District Court for the District of Nebraska, under the provisions of Title 35, United States Code, Section 281, and Title 28, United States Code, Section 1338(a).

The patent in suit (Ptf's. Ex. 11, R. 83) deals generally with a self-supporting portable apparatus or machine by which cattle or other livestock are enabled to obtain relief from and medication for external irritations caused by insects or certain diseases. The patent is a comprehensive one, setting forth 17 claims which define various independent but related combinations and subcombina-

tions embodied in the machine as a whole. Of these 17 claims, as earlier noted, only five were in suit. *

The action was instituted against respondents by reason of their competitive manufacture and sale of the "ITCHIT" machine illustrated and described in brochures published by respondent (Ptf's. Exs. 5, 6, SR. 29, 31) and also shown in the special charts prepared for trial (Ptf's. Exs. 8, 9 and 10, R. 80, 81, and 82). The usual defenses of invalidity for lack of invention and non-infringement were interposed, the defendant submitting on the issue of invention some 27 prior patents (Dfts.' Exs. I and P) and oral testimony concerning alleged prior use of chain or barbed wire wrapped with burlap sacking, impregnated by periodically manually pouring oil thereon (R. 67-79; SR. 28).

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*Claim 1. In an animal rubbing and oiling station, a horizontally-disposed base having an outermost portion; a support extending upwardly from said base and having an upper end; a catenated rubbing and oiling portion, including an elongated loosely flexible member extending from adjacent said outermost portion of said base upwardly to adjacent the upper end of said support, and a plurality of perforated members strung along said elongated member, each perforated member having an oil-film receiving outer face and opposite oil-film receiving end faces; and means for flowing oil onto said elongated member.

Claim 7. In an anima' rubbing and oiling station, a horizontally-disposed base having an outermost portion; an oil reservoir constituting a rigid support extending upwardly from said base and having an upper end; a catenated rubbing and oiling member extending from adjacent said upper end downwardly and outwardly to adjacent said outermost portion, means securing said rubbing and oiling member at adjacent said outermost portion; means for conducting oil to said rubbing and oiling member including a flow way extending, from adjacent said upper end, outwardly and downwardly and having an outlet at its lowermost end with the upper end of said rubbing and oiling member extending into said outlet, and said flow way at the uppermost end of the flow away.

The District Court, after trial on the merits, and after giving full and complete consideration to the claims in suit, held that the claims were infringed and that respondents had failed to prove that the claims were invalid for lack of invention (R. 40). The Court noted (R. 22) the immediate commercial success of the invention as reflected by the sale of machines made in accordance with the patent, the widespread notoriety given the machine and the inventor, in such prominent publications as Collier's Magazine (SR. 35) and Time Magazine (SR. 37), and the fact that respondents had not come onto the market until after examining the Kirk machine (R. 23). As to respondents' argument that the claims covered nothing more than an aggregation of old elements which performed no new or different functions, the District Court did not accept this (R. 39, 40). The Court concluded that so far as claims 1, 7, 11, 17 and 19 were concerned, the patent was valid. Judgment was accordingly granted in favor of petitioner (R. 44).

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Claim 11. In an animal rubbing station, a horizontally-extending base having an outermost portion; a support extending upwardly from said base and having an upper end; and a catenated rubbing portion including an elongated flexible member extending from adjacent the upper end of said support outwardly and downwardly therefrom to adjacent said outermost portion of said base, with a plurality of perforated members, having exposed rubbing surfaces strung loosely upon said elongated member.

Claim 17. In an animal rubbing and oiling station the combination of an upstanding rigid support including an oil supply reservoir, a loosely flexible, elongated rubbing element, means including an upwardly and downwardly movable element in said support to supply oil from the reservoir to the upper end of said rubbing element upon downward movement of said movable element, means connecting the upper end of said rubbing element to said upwardly and downwardly movable element, means fixing the lower end of said rubbing element against movement and means for yieldably raising said upwardly and downwardly movable element to an upper position and disposing said rubbing

On appeal to the Circuit Court of Appeals, the findings of the Trial Court on the issues of infringement, novelty, utility, commercial success and public acceptance were noted with approval (Appendix A, pages A2, A7). The Court of Appeals decided, however, that notwithstanding these findings, the District Court should be reversed on the issue of validity.

The legal errors committed by the Court of Appeals in reaching its conclusions with respect to validity are the errors from which relief is sought by this petition. Those errors, are, briefly stated:

1. The "patent" found invalid by the Court of Appeals was one neither claimed by the patentee, nor granted by the Patent Office.

2. The concept of the law of patentable invention adopted and relied upon by the Court of Appeals is neither authorized by the decisions of this Court nor in accordance with the pertinent Acts of Congress pertaining thereto.

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element in the shape of a catenary, in their normal conditions, whereby gravity flow of the oil along the rubbing element will occur upon downward movement of the upper end portion of the rubbing element and said upwardly and downwardly movable element, incident to an animal distorting the rubbing element from its normal condition by rubbing engagement therewith, at any position with respect thereto.

Claim 19. In an animal rubbing and oil station the combination of an upstanding rigid support including an oil supply reservoir, a loosely flexible, elongated rubbing element, means including an upwardly and downwardly movable element in said support to supply oil from the reservoir to the upper end of said rubbing element upon downward movement of said movable element, said support having a cylindrical nipple serving as a flow way for oil to the rubbing element, means connecting the upper end of said rubbing element through said nipple to said upwardly and downwardly movable element, means fixing the lower end of said rubbing element against movement, and means for yieldably

## REASONS RELIED UPON FOR THE GRANTING OF CERTIORARI.

### I. The Court of Appeals for the Eighth Circuit, in Deciding the Question of Validity, Employed a Legal Construction of the Patent in Direct Conflict with That Required under Title 35, United States Code, Sections 154 and 112, and the Decision of This Court in Altoona Theatres v. Tri-Ergon Corporation, 294 U.S. 477.

In any patent, the subject matter protected thereby is what is set forth in the claims appended to the specification. The Patent Statutes provide that the patent contains the "grant to the patentee * * * of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification for the particulars thereof." (Title 35, Sec. 154, Appendix B). In setting up the requirements of the specification, Congress stated:

> "The specification shall conclude with one or more claims pointing out and distinctly claiming the subject matter the applicant regards as his invention." (Title 35, Sec. 112, Appendix B).

This Court has had occasion to spell out for the guidance of the lower courts the legally restrictive nature of the patent claims and their controlling importance in determining the character of the patent and the invention or

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raising said upwardly and downwardly movable element to an upper position and disposing said rubbing element in the shape of a catenary, in their normal conditions whereby gravity flow of the oil along the rubbing element will occur upon downward movement of the upper end portion of the rubbing element and said upwardly and downwardly movable element, incident to an animal distorting the rubbing element from its normal condition by rubbing engagement therewith, at any position with respect thereto.

inventions protected thereby. *Turrill* v. *Railroad Company*, 68 U.S. 497, 511; *O'Reilly et al.* v. *Morse et al.*, 56 U.S. 62, 123; *Leeds & Catlin* v. *Victor Talking Machine Co.*, 213 U.S. 301, 318; *Special Equipment Company* v. *Coe*, 324 U.S. 370, 377; *Altoona Theatres* v. *Tri-Ergon Corporation*, 294 U.S. 477, 487.

In *Altoona Theatres* v. *Tri-Ergon Corporation*, Mr. Justice Stone, speaking for a unanimous court, observed at page 487:

> "The Court of Appeals, in upholding the patent, made no examination of its separate claims, but treated the patent throughout as though it were a combination of five distinct elements, the photoelectric cell, the arcuate flexing of the film, the flywheel, the flexible connection of the flywheel and the optical slit, although nowhere in the patent is any such combination claimed. The patent thus upheld is one which was neither claimed nor granted. Under the statute it is the claims of the patent which define the invention. See *White* v. *Dunbar*, 119 U.S. 47, 51, 52; *McClain* v. *Ortmayer*, 141 U.S. 419; *Smith* v. *Snow*, *ante*, p. 11. And each claim must stand or fall, as itself sufficiently defining invention, independently of the others. See *Carlton* v. *Bokee*, 17 Wall. 463, 472; *Russell* v. *Place*, 94 U.S. 606, 609; *Leeds* v. *Catlin Co.* v. *Victor Talking Machine Co.*, 213 U.S. 301, 319; *Symington Co.* v. *National Malleable Castings Co.*, 250 U.S. 383, 385; *Smith* v. *Snow*, *supra*; Walker on Patents, Par. 220, 6th ed."

While the decision in the *Altoona* case turned on the failure of the claims to recite the invention found valid by the lower courts, nevertheless the principles are fully applicable here. The Court of Appeals in this case has, vice versa, found invalid a patent which was "neither claimed nor granted".

In its decision the Court of Appeals, after giving a somewhat more comprehensive description of the actual machine, characterized the Kirk "invention" in the following language:

> "Reduced to its simplest terms, Kirk's contribution to the art of oiling an animal consists of (1) a horizontal base, (2) an upright tank, (3) two loosely hung cables or catenaries extending from the top of the tank downwardly to the ends of the base, and (4) the means for raising liquid from the reservoir to flow down the cables when needed." (Appendix A., page A6).

When we turn to the language of the patent itself, however, it is apparent that in direct contravention of the statutes and authorities cited above, basic elements of the claims have been ignored completely by the Court of Appeals.

For example, claim 1 of the patent deals with a combination which, while it does include the base, tank and loosely flexible elongate member in the form of a catenary, also calls for "a plurality of perforated members strung along said elongated member, each perforated member having an oil film receiving outer face and opposite oil film receiving end faces." The perforated members are part and parcel of the combination claimed, but it is evident that they were ignored by the Court of Appeals in its comparison of the Kirk device with the prior art. Their importance in the combination is clearly set forth in the patent as to function served. If any further evidence of their importance is needed, it can be found in the fact that respondents did not produce a machine without them (R. 24).

Claims 17 and 19 are entirely different in both scope and subject matter from claims 1 and 11, and as a matter of

fact, define entirely different, although related, inventions. As contrasted with claims 1 and 11; claims 17 and 19 define the specific and essential elements of a structure in which bending distortion of the flexible, cable-like rubbing element, no matter at what point, or in what direction, results in delivery of liquid from the reservoir thereto. However, the Court of Appeals makes no mention whatever of these claims other than to pay lip service to the fact that they are in suit, and it is believed evident that no consideration was given the subject matter defined therein.

As to claim 7 of the patent, here again there is set forth a combination which differs materially in both elements and arrangement from the combinations defined in the other claims in suit, and which likewise differs substantially from the hypothetical restatement of the "invention" set up and compared with the prior art by the Court of Appeals.

It is respectfully submitted that the failure of the Court of Appeals to give the claims in suit separate consideration, in the light of the individual inventions set forth therein constitutes such a departure from the usual course of judicial proceeding in patent cases as to call in and of itself for the exercise of this Court's power of supervision and correction.

**II. The Court of Appeals, in Assessing the Question of Invention on the Basis of a Completely Erroneous Concept of the Subject Matter Protected by the Patent, Applied a Test of Invention Far Exceeding Any Test Sanctioned Heretofore by This Court.**

The reorganization and oversimplification of the subject matter of the individual claims of the patent into an amorphous concept which ignores the practical mechanics

of how the results sought by Kirk were obtained has resulted in an unwarranted, wholly arbitrary disposition of the patent.

We submit that had the Court of Appeals measured against the prior art the exact inventions defined in the patent claims in suit, as required by the *Altoona Theatres* case, *supra*, there could have been no conclusion that *all* of the elements *of these claims* were old, nor that the claimed subject matter could have been reasonably expected, without the assistance of the Kirk disclosure, from a skilled mechanic familiar therewith.

The Court of Appeals noted that long before Kirk it was a matter of common knowledge that domestic animals would rub against trees, posts and guy wires of fence posts to relieve their itching, and that being infested with and annoyed by insects was harmful to such animals. However, Kirk made no claim that he was the first to discover this. It is, in fact, evident from the record (Dfts' Exs. I and P) that the itching and infestation of animals had long been a problem for which solutions in the form of new and better mechanisms were being sought.

The Court further observed that homemade devices such as chains or wires strung from or between posts and hung with oil impregnated sacking, had long been used as a means of enabling cattle to oil themselves and relieve their itching. However, as the record also clearly shows, this was, at best, an arrangement not without several problems. The sacking often either rubbed or fell off, requiring frequent replacement (R. 73; SR. 24, 28), and in addition, liquid had to be periodically manually poured on the sacking in order to maintain it sufficiently impregnated to be beneficial (SR. 28).

The only other prior art referred to by the Court was the patent to Curttright 1,327,088 (reproduced at Appendix C, infra). This patent discloses a rigid inclined rod secured at one end to a base and supporting on its upper end an oil can. The rod is surrounded by a hollow tube or sleeve fulcrumed at its mid-point so that when the sleeve is tilted it will act as a lever to trip a check valve in the bottom of the oil tank. The Curttright patent was one of the references specifically considered by the Patent Office during the prosecution of the Kirk application, and over which the claims were allowed. (Ptf's. Ex. 11, R. 83, last page).

Turning briefly now to the claims in suit, it is believed at once apparent that claim 1, for example, recites elements which do not appear anywhere in the art referred to, and which are arranged in a fundamentally different way to operate in an entirely different manner than chains or wires hung with sacking or the device of the Curttright patent. By providing the inclined, loosely flexible elongated member (cable) held only at its ends, means for flowing oil onto the cable, and the perforated members on the cable with oil film receiving end and outer faces, the animal is given a contour adapting rubbing and oiling arrangement which, despite its flexibility, has a hard, abrasive rubbing surface (the perforated members) yet achieves the application of oil from the cable to the animal no matter where rubbing contact might be made. Yet no mention was made by the Court below, in comparing the Kirk device with the prior art, of the perforated members, nor of the important fact that in the Kirk device, actual and claimed, oil is not delivered generally to the exterior of the perforated members, but to the cable itself, from which it is transferred at the point of rubbing contact to the animal by the perforated members.

The differences between the subject matter claimed in the patent as compared with the Court's generalized description of the Kirk machine are even greater, if possible, in respect to claims 17 and 19. The problems involved in obtaining flow of liquid from an upright tank to a flexible cable as the result of distortion or flexing of the latter are simply not the same as where a rigid rubbing element is employed, as in the Curttright patent. If there is any way that a flexible cable could be connected into the Curttright machine, it has yet to be pointed out to this petitioner. We submit it as evident to anyone with the powers of mechanical analysis that such as substitution is impossible and that there is no comparison between the elements of the claims and the Curttright machine.

The concurrent findings of the District Court that the Kirk commercial machine, which embodied the inventions of the patent claims, had novelty, utility, met with acceptance in the art, and enjoyed commercial success, clearly refutes any *a priori* judgment that the subject matter of the Kirk claims could have reasonably been expected from a skilled mechanic familiar with this art. Gunny sacking on wires has been used as long as twenty-five years prior to the Kirk development (R. 75). The Curttright patent issued in 1920, some thirty years prior to Kirk. That the problem of finding a satisfactory device occupied the attentions of workers in this art during the interim is evident from the many, many patents included in Defendants' Exs. I and P. If the way to the Kirk invention was so clearly pointed by the art relied upon by the Court below, then why the long span of years before it appeared?

While we agree that in the last analysis, the question of invention in any case must be settled on the basis of a subjective judgment by a court, nevertheless, we do not

believe that this Court's decisions in *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U.S. 84, and *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, relied upon so heavily by the Court below, should be construed as a mandate to disregard, as having no bearing on the question of invention, the actual history of development of the subject matter and the effects in the art in which it lies. Yet, judging from the decisions of the Eighth Circuit Court of Appeals over the past fifteen years, particularly those cited in the opinion here involved, it is manifest that such is the construction placed on those decisions by that Court.

Admittedly, commercial success cannot *supply invention* where such inherently is lacking. But where, as here, the prior art does not clearly and conclusively overcome the presumption of invention which inheres in the patent grant (Title 35, Sec. 282, Appendix B), it is well settled that commercial success should be considered. As this Honorable Court said in *Goodyear Tire & Rubber Co., Inc., et al.*, v. *Ray-O-Vac Company*, 321 U.S. 275, 279:

> "Viewed after the event, the means Anthony adopted seem simple and such as would have been obvious to those who worked in the field, but this is not enough to negative invention. During a period of half a century, in which the use of flashlight batteries increased enormously, and the manufacturers of flashlight cells were conscious of the defects in them, no one devised a method of curing such defects. Once the method was discovered it commended itself to the public as evidenced by marked commercial success. These factors are entitled to weight in determining whether the improvement amounted to invention and should in a close case, tip the scales in favor of patentability."

Thus, while not itself invention, nor conclusive evidence thereof, the utility of the change wrought by an inventor, as attested by its widespread acceptance in the industry, has, as a practical matter, been accorded the greatest weight in determining invention. *Diamond Rubber Company* v. *Consolidated Rubber Tire Company*, 220 U.S. 428; *Eibel Process Company* v. *Minnesota & Ontario Paper Company*, 261 U.S. 45; *Minerals Separation* v. *Hyde*, 242 U.S. 261; *Richmond Screw Anchor Company* v. *United States*, 275 U.S. 331; *Webster Loom Company* v. *Higgins*, 105 U.S. 580.

For the Eighth Circuit Court of Appeals to discard and disregard entirely acceptance of a machine in the industry to which it relates, or the existence of a need for such a machine over a period of years, which are solid facts capable of proof by firm evidence, in favor of a simple subjective analysis by hindsight based only on assumed physical differences between what went before in the prior art and the device under consideration, results in a test of invention which is not a legal test. It is more akin to an esoteric judgment, which can shift with the whims of the judges sitting without there being any accountability to either the losing litigant or the Court above. Such a test is neither proper under the decisions of this Court, nor under the statutes.

### III. In Holding That the Standard of Invention Has Been Raised, the Court of Appeals Misconstrued Decisions of This Court and Ignored the Provisions of Title 35, U. S. Code, Section 103.

Prior to this Court's decision in the *Cuno Engineering* case, *supra*, the Eighth Circuit Court of Appeals had observed the long accepted and proper rule that "invention" means something more than mechanical skill. Paradoxically the very cases identified by that Court in its present

opinion as no longer defining the correct criteria so held. See *G. H. Packwood Manufacturing Co.* v. *St. Louis Janitor Supply Company*, 8 Cir., 115 F.2d 958, 964-965, and *Strong-Scott Manufacturing Co.* v. *Weller*, 8 Cir., 112 F.2d 389 at 394.

The Eighth Circuit Court now holds, however, that it was mistaken in its earlier cases; that the *Cuno Engineering* and *A & P* cases lay down a raised standard of originality which is more exacting. In substance, the Court apparently requires not only that the subject matter exceed "mechanical skill", but that it also involve such an advance in the art that it accomplishes some basically new purpose, never before achieved, as distinguished from accomplishing an old purpose in a better, more efficient, and advantageous way. The lower Court, in effect, says that no matter how ingenious the new mechanism, if it does nothing more than accomplish in a better and improved way an object which itself is old, then it cannot be considered as "exceeding what could reasonably be expected of a skilled mechanic" and cannot under any circumstances, rise to the dignity of patentable invention.

The statutes, to which no reference was made by the Court below, provide that patents shall be granted for "new and useful improvements" in machines (Title 35, Sec. 101, Appendix B).

Whether the subject matter of the improvement is invention is to be determined on the bases of "whether the subject matter as a whole" would have been obvious to a person having "ordinary skill in the art to which the subject matter pertains". (Title 35, Sec. 103, Appendix B).

Purpose, in a general sense of doing a particular job, has no bearing. The progress of any art is

promoted by machines which accomplish old purposes in better, more economical and faster ways. This has been recognized many times by this Court in the sustaining of improvement patents. *Exhibit Supply Company* v. *Ace Patents Corporation*, 315 U.S. 126; *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 U.S. 364; *Goodyear Tire & Rubber Co., Inc.*, v. *Ray-O-Vac Company*, 321 U.S. 275; *Graver Tank & Mfg. Co., Inc., et al.* v. *Linde Air Products Co.*, 336 U.S. 271; *Faulkner* v. *Gibbs*, 338 U.S. 267.

The Court of Appeals for the Eighth Circuit interprets the *Cuno Engineering* and *A & P* cases as calling for a considerably higher standard of invention than that established by Sec. 103 of the statutes, and thus is in clear conflict both with the statute and with the Courts of Appeals for the Second and Third Circuits, which hold that Sec. 103 should control. *Lyon* v. *Bausch & Lomb Optical Co.*, 2 Cir., 224 F.2d 530, 534-536; *R. M. Palmer Co.* v. *Luden's, Inc.*, 3 Cir., 236 F.2d 496, 500-502.

The conflict which exists between the Courts of Appeals of the Second, Third and Eighth Circuits, and between the latter and the Congress, as to the standards by which patentable invention is to be measured can only be resolved by this Court.

## PRAYER.

For the foregoing reasons, your petitioner respectfully prays that a Writ of Certiorari be issued to the Circuit Court of Appeals for the Eighth Circuit to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Appeals for the Eighth Circuit be reversed, and that petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

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# APPENDIX

## APPENDIX A.

# United States Court of Appeals
## FOR THE EIGHTH CIRCUIT.

No. 16,158.

| | |
|---|---|
| Robert E. Caldwell, an Individual, and Caldwell Manufacturing Company, a Corporation, Appellants, vs. Kirk Manufacturing Company, a Corporation, Appellee. | Appeal from the United States District Court for the District of Nebraska. |

[August 13, 1959.]

Donald H. Zarley (M. Talbert Dick and Herman Ginsburg were with him on the brief) for Appellants.

Carter H. Kokjer (Thomas E. Scofield, Warren C. Johnson, and Cline, Williams, Wright & Johnson were with him on the brief) for Appellee.

Before SANBORN, VAN OOSTERHOUT and MATTHES, Circuit Judges.

SANBORN, Circuit Judge.

This is an appeal from a judgment for the Kirk Manufacturing Company, plaintiff (appellee), in a patent infringement action. The patent in suit is No. 2,581,028 issued to William M. Kirk on January 1, 1952, for an "Animal Rubbing and Oiling Station or Apparatus." The plaintiff owns the patent and is engaged in making and marketing the patented device. The defendants (appellants) make and sell a similar device originated by Robert E. Caldwell, which is alleged to infringe the Kirk patent. The accused Caldwell device is covered by two patents: No. 2,706,465 issued on April 19, 1955, and No. 2,785,653 issued on March 19, 1957, both for a "Livestock Oiler and Applicator Apparatus." The defendant Caldwell Manufacturing Company, a Nebraska corporation, with its principal place of business at Kearney, Nebraska, is the assignee of the Caldwell patents.

In answering the plaintiff's amended complaint, the defendants denied infringement of the Kirk patent in suit, and alleged that it was invalid for lack of invention. The issues were tried to the District Court, Claims 1, 7, 11, 17 and 19 of the patent being in controversy. In a carefully considered and comprehensive opinion (163 F. Supp. 157), the District Court determined that the patent claims in issue were valid and that they had been infringed by the defendants.

So far as the question of infringement is concerned, we have no doubt that if the Kirk apparatus for anointing livestock with oil or insecticide reveals inventive genius, and not merely the skill of a mechanic familiar with the art, the finding of infringement must be sustained. See and compare, *McDonough* v. *Johnson-Wentworth Co.*, 8 Cir., 30 F.2d 375, 383-385 and cases cited; *Koochook Co., Inc.*, v. *Barrett*, 8 Cir., 158 F.2d 463, 465. Needless to say, if the Kirk patent is invalid for want of invention, as the

defendants argue, there can be no infringement of its claims. *Briggs & Stratton Corporation* v. *Clinton Machine Co., Inc.*, 8 Cir., 247 F.2d 397, 400-401.

It is the question of the validity of the Kirk patent which gives us concern. The Kirk apparatus or device is a combination of old elements which, it is claimed, act in concert to product a new and useful entirety which rises above the level of its parts and is attributable to inventive genius. It is true, as the District Court points out, that the defendants, who succeeded in procuring patents on their accused apparatus—also composed of old elements and which constitutes no appreciable advance over Kirk—are in a poor position to urge that Kirk's contribution to the art was unpatentable. Nevertheless, as this Court said in *Long* v. *Arkansas Foundry Company*, 8 Cir., 247 F.2d 366, 369, "The public is a silent but an important party in interest in all patent litigation * * *." A device which is new and useful but which falls short of revealing more than mechanical skill "has not established its right to a private grant on the public domain." *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U.S. 84, 91.

Mr. Justice Douglas in his concurring opinion in *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, 154-155, said:

> "Every patent is the grant of a privilege of exacting tolls from the public. The Framers [of the Constitution] plainly did not want those monopolies freely granted. The invention, to justify a patent, had to serve the ends of science—to push back the frontiers of chemistry, physics, and the like; to make a distinctive contribution to scientific knowledge. That is why through the years the opinions of the Court commonly have taken 'inventive genius' as the test. It is not enough that an article is new and useful. The Constitution never sanctioned the patenting of gadg-

ets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance. * * *"

"The standard of patentability is a constitutional standard; and the question of validity of a patent is a question of law. * * *"

In the majority opinion in the *Great Atlantic & Pacific Tea Co.* case, the Supreme Court took pains to say (pages 152-153 of 340 U.S.):

"Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly."

And in conclusion said (page 154 of 340 U.S.):

"* * * The defect that we find in this judgment is that a standard of invention appears to have been used that is less exacting than that required where a combination is made up entirely of old components. * * *"

This Court, as well as the Supreme Court, has recognized that if a trial court in a patent case has failed to

apply proper legal standards in determining the presence or absence of invention, its finding upon that issue will be reversed on appeal as clearly erroneous. (See: *Frank Adam Electric Co. v. Colt's Patent Fire Arms Mfg. Co.*, 8 Cir., 148 F.2d 497, 502-503; *Koochook Co., Inc., v. Barrett*, *supra*, pages 466-467 of 158 F.2d. That is saying no more than that a finding of fact which is induced by an erroneous view of the law is erroneous.

More exacting standards for determining patentable invention have been applied by the courts in recent years than was formerly the case. In *Trico Products Corporation v. Delman Corporation*, 8 Cir., 180 F.2d 529, 533, this Court said:

> "• • • It is, no doubt, true that this Court is applying higher standards than it formerly did for determining whether patented improvements of practical value and which have met with commercial success involve invention or only mechanical skill. Compare, *G. H. Packwood Mfg. Co. v. St. Louis Janitor Supply Co.*, 8 Cir., 115 F.2d 958, with *Frank Adam Electric Co. v. Colt's Patent Fire Arms Mfg. Co.*, *supra*, 148 F.2d 497. The Supreme Court has, we think, raised the standards of originality necessary to sustain patents for improvements such as those involved in the instant cases, regardless of their usefulness or commercial success. Compare, *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U.S. 45, 43 S. Ct. 322, 67 L. Ed. 523, and *Temco Electric Motor Company v. Apco Manufacturing Company*, 275 U.S. 319, 48 S. Ct. 170, 72 L. Ed. 298, with *Cuno Engineering Corp. v. Automatic Devices Corp.*, *supra*, 314 U.S. 84, 62 S. Ct. 37, 86 L. Ed 58."

See also: *Hall Laboratories, Inc., v. Economics Laboratory, Inc.*, 8 Cir., 169 F.2d 65; *Alemite Co. v. Jiffy Lubricator Co.*, 8 Cir., 176 F.2d 444, 448-449; *Miller v. Tilley*, 8 Cir., 178 F.2d 526, 528; *Steffan v. Weber Heating and Sheet*

*Metal Co.*, 8 Cir., 237 F.2d 601, 604; and the concurring opinion in *Briggs & Stratton Corp. v. Clinton Machine Co.*, 8 Cir., 247 F.2d 397, 400-401.

The vital question in this case is whether the Kirk device for oiling animals—or, rather, for enabling the animals to oil themselves—advanced that art sufficiently to entitle Kirk to a patent monopoly for his device. The Kirk device consists of: A large horizontal base made up of interconnected tubular members; a centrally-located, hollow, upright, metal cylindrical tank, supported by and fastened to the base. The tank serves as a reservoir for insecticide or oil, and as a support for the rubbing and oiling elements. Extending outwardly and downwardly from short troughs or flow ways at the upper end of the cylindrical reservoir are two oppositely-disposed flexible cables or catenaries, upon which are strung metal washers. The lower ends of the cables are secured to the extremities of the base. The upper ends are connected with the flow ways, which are a part of the means provided by Kirk for causing the oil, after being lifted from the reservoir, to flow downward onto the cables and the washers which constitute the rubbing and oil-applying elements of the device. The means provided for elevating oil from the reservoir to the flow ways are a pair of chain-type pumps, each of which is set in motion whenever an animal rubs against the cable, the distortion of which activates that pump.

Reduced to its simplest terms, Kirk's contribution to the art of oiling an animal consists of (1) a horizontal base, (2) an upright tank, (3) two loosely-hung cables or catenaries extending from the top of the tank downwardly to the ends of the base, and (4) the means for raising liquid from the reservoir to flow down the cables when needed.

The record shows that long before Kirk it was a matter of common knowledge that domestic animals would rub against trees, posts and guy wires of poles or of fence posts, to relieve their itching, and that being infested with and annoyed by insects was harmful to such animals. The record also shows that homemade devices, such as chains or wires strung from or between posts and hung with oil-impregnated sacking or the like, had long been used as a means of enabling cattle to oil themselves and relieve their itching. Kirk's conception of the solution to the cattle-oiling problem was, of course, based upon his knowledge that livestock would rub themselves against the cables of his device, which, for rubbing purposes, are the equivalent of loose guy wires, and that if oil could be fed to the cables when it was needed it would reach the hide of the animals and accomplish the desired result. While there are many prior art patents having to do with furnishing the means for oiling animals, none of them can be said to be an anticipation of Kirk. There is, however, no unbridgeable gap between the rubbing and oiling means disclosed in the patent to Curtright, No. 1,327,088, issued January 6, 1920, and those of the patent in suit. It cannot be said that Kirk did much more than bring together segments of or gleanings from the prior art or that what he did exceeded what reasonably could be expected of a skilled mechanic familiar with the prior art.

If the correct criteria of invention were the same today as they were thought to be at the time this Court decided such cases as *McDonough* v. *Johnson-Wentworth Co.*, *supra*, 30 F.2d 375, *Strong-Scott Mfg. Co.* v. *Weller*, 112 F.2d 389, and *G. H. Packwood Mfg. Co.* v. *St. Louis Janitor Supply Co.*, 115 F.2d 958, we would be inclined to agree with the trial court that the novelty, utility, commercial success, and public acceptance of the Kirk combination

shown by the record, would, together with the presumption of validity of his patent, be enough to sustain the finding of the validity of its claims. We think, however, that under the more exacting standards established by the Supreme Court in the cases which are cited in *Briggs & Stratton Corporation* v. *Clinton Machine Co., Inc.*, 8 Cir., *supra*, at page 401 of 247 F.2d, the Kirk combination of old components, in view of what was common knowledge and what was disclosed by the prior art, cannot be held to rise to the dignity of patentable invention.

Under what we understand to be the latest teachings of the Supreme Court with respect to the standards of invention necessary to sustain the grant of a patent monopoly, we are of the opinion that the Kirk patent is invalid for want of invention.

The judgment appealed from is therefore reversed and the case remanded with directions to dismiss the action.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

## APPENDIX B.

### The Constitutional Provision.

Art. I, Sec. 8. The Congress shall have power * * * To promote the progress of science *and the useful arts*, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

### Title 35, United States Code.

Sec. 101. Inventions Patentable.

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter,

or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Sec. 102. Conditions for Patentability; Novelty and Loss of Right to Patent.

A person shall be entitled to a patent unless—

(a) the invention was *known* or *used* by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

(c) he has abandoned the invention, or

(d) the invention was first patented or caused to be patented by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application filed more than twelve months before the filing of the application in the United States, or

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or

(f) he did not himself invent the subject matter sought to be patented, or

(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining

priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

Sec. 103. Conditions for Patentability; Non-Obvious Subject Matter.

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Sec. 112. Specification.

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to

cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

Sec. 154. Contents and Term of Patent.

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

Sec. 282. Presumption of validity; Defenses.

A patent shall be presumed valid. The burden of establishing validity of a patent shall rest on a party asserting it.

The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:

(1) Noninfringement, absence of liability for infringement, or uneforceability,

(2) Invalidity of the patent or any claim in suit on any ground specified in Part II of this title as a condition for patentability,

(3) Invalidity of the patent or any claim in suit for failure to comply with any requirement of sections 112 or 251 of this title,

(4) Any other fact or act made a defense by this title * * *.

## APPENDIX C.

G. L. CURTTRIGHT.

HOG OILER.

APPLICATION FILED AUG. 19, 1916.

1,327,088. Patented, Jan. 6, 1920.

Fig 3

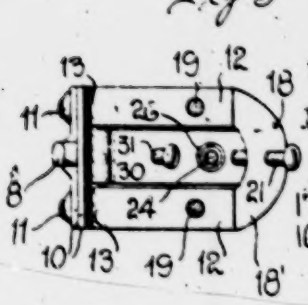
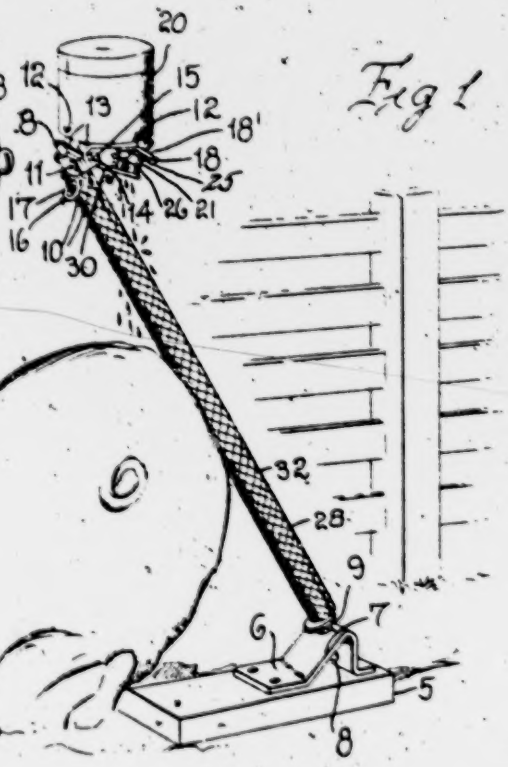



Fig 1



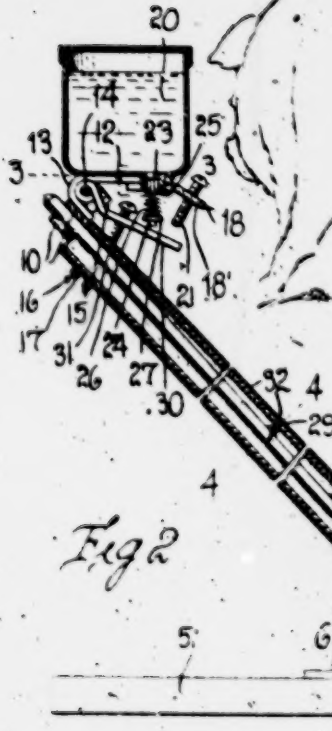
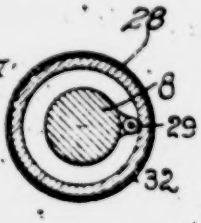




Fig 2

Fig 4




Inventor,
GEORGE L. CURTTRIGHT

By Watson E. Coleman

Attorney

# UNITED STATES PATENT OFFICE.

GEORGE L. CURTRIGHT, OF OLIN, IOWA.

## HOG-OILER.

1,327,088. Specification of Letters Patent. Patented Jan. 6, 1920.

Application filed August 19, 1916. Serial No. 115,861.

*To all whom it may concern:*

Be it known that I, GEORGE L. CURTRIGHT, a citizen of the United States, residing at Olin, in the county of Jones and State of Iowa, have invented certain new and useful Improvements in Hog-Oilers, of which the following is a specification, reference being had to the accompanying drawings.

This invention relates to an improved hog oiler and has for its primary object to provide a simply constructed and novel device for applying and thoroughly rubbing oil into the hide of the hog so as to destroy vermin, and without waste of the oil.

It is another and more particular object of my invention to provide a device of this character embodying a suitable base, a vertically inclined oil applying member movably supported by said base, an oil container mounted at the upper end of said member and provided with a normally closed valve adapted to be opened by said oil applying member to release the oil.

It is a further general object of my invention to provide a device for the above purpose which is inexpensive and durable in its construction and highly serviceable and convenient in practical use.

With the above and other objects in view, my invention consists in the novel features of construction, combination and arrangement of parts to be hereinafter more fully described, claimed and illustrated in the accompanying drawing, in which,

Figure 1 is a perspective view illustrating the preferred embodiment of my improved hog oiler;

Fig. 2 is a vertical sectional view;

Fig. 3 is a section taken on the line 3—3 of Fig. 2; and

Fig. 4 is a section taken on the line 4—4 of Fig. 2.

Referring in detail to the drawing, 5 designates a suitable base upon which a plate 6 is securely fixed at its outer end, said plate having an intermediate, upwardly inclined portion 7. This inclined portion of the plate 6 is provided with openings to receive the lower ends of a vertical rod 8, suitable clamping nuts 9 being threaded upon said rod 8 [illegible] and thereby secure [illegible]

Upon the upper end of the rod 8 [illegible] versely disposed plates 10 are securely clamped by means of the bolts 11. Horizontally disposed arms 12 have one of their ends angularly bent, as at 13, and provided with openings to receive the clamping bolts 11. A rod 14 has eyes formed upon its ends which are also engaged upon said bolts, and the nuts 15 threaded upon the bolts securely hold the several parts in assembled relation. The ends of a U-shaped rod 16 are engaged upon the other ends of the bolts 11 and securely held thereby. This rod projects downwardly in spaced parallel relation beneath the rod 8 and has its intermediate portion curved or bowed, as at 17, to form a saddle or seat for a purpose to be presently referred to.

A U-shaped plate 18 has its extremities secured to the horizontal arms 12 by means of the bolts 19 which extend through openings in the base wall of an oil container 20. The medial portion of the plate 18 is obliquely inclined downwardly, as at 18', and in the same a stop screw 21 is threaded. A valve 23 of any suitable type is mounted upon the bottom wall of the container 20 and the valve stem 24 projects downwardly through the sleeve 25 formed on the valve casing, which extends through the bottom wall of the container 20. A coil spring 26 is engaged upon said valve stem between the end of the sleeve 25 and a nut 27 threaded on the stem.

A tubular rod 28 loosely surrounds the fixed rod 8 and, at its upper end, is supported in the saddle or seat 17. A [illegible] ly extending leaf spring 29 is fixed at one of its ends in the rod 7 and bears upwardly at its free end against the wall of the tubular rod 28 adjacent the lower end thereof. A transversely disposed roller 30 is mounted on the upper side of the rod 8 at a point intermediate of its ends, said roller serving to rotatably support the tubular rod in spaced relation to the fixed rod 8 and also constituting a fulcrum for the [illegible] rod 28 to permit of a slight oscillating movement of the [illegible] engagement with the tubular rod 28. Upon the

the periphery of this rod 28, a sheet of wire fabric 32 is soldered or otherwise securely fixed.

From reference to Fig. 1 of the drawing, the operation of the device will be clearly understood. The germicide oil is placed in the container 20, said container having a suitable top or cover and the valve 23 being normally closed prevents the escape of the oil. A spring 30 bears against the rod 28 and against the upper portion of the tubular rod 25 and exerts an upward pressure against it. Since it will be manifest that this rod will be oscillated, upon the supporting tube 20 against the action of the spring 29, and the upper end of the rod 25 bearing against the stop screw 31 will lift the arm 30 and force the valve 23 positively to its open position. The oil will then escape from the container and flow downwardly over the arm 30 and upon the fabric 32 which is on the periphery of the rod 28. As this fabric provides a roughened surface, the hair on the coat of the animal will be agitated and lifted so that the oil will be applied to the roots as it is rotated, directly to the animal's skin. If the animal should move over the lower end portion of the tubular rod 25, the contact of its body thereon would exert a downward pressure upon the same against the action of the spring 29, so that said rod will be again oscillated and the upper end thereof lifted against the stop screw 31 to open the valve. The oil supplied to the rod 28 is acted upon by the mesh of the wire fabric 32 as it flows downwardly thereon, so that there will be no waste of the oil. When the hog exerts a pressure against either side of the rod 28, the U-shaped rod 16 against which the said rod 28 bears at its upper end, directs the oil applying rod upwardly and into engagement with the screw 31, thereby lifting the valve operating plate 24. Thus, the flow of the oil to its application to the hide of the hog is started no matter in what direction the pressure is applied upon the rod 28. The adjustable stop screw 31 regulates the flow of the oil, and it will be understood that in cold weather when the oil is thicker and heavier it will be properly adjusted so that there will be but a slight movement of the valve operating plate 24 when the oil applying rod is oscillated by the pressure of the animal against the same. It will be seen that I have produced in a very simple device, means for applying and thoroughly rubbing the oil into the hide of the animal and without waste of the oil, thereby contributing to economy in the use of the device. As the reservoir or container for the oil is supported at a considerable distance above the ground, it cannot be struck and overturned by the animal. I have herein referred to a particular means for mounting and supporting the fixed rod 8 and the oil applying member, but it is manifest, of course, that these parts may be mounted in various other ways. The detail form and construction of the several elements of the device may also be greatly modified and I, therefore, reserve the privilege of adopting all such legitimate changes as may be fairly embraced within the spirit and scope of the invention as claimed.

Having thus fully described my invention, what I desire to claim and secure by Letters Patent is:—

1. A hog oiler including a fixed support, a hollow oil applying member rotatable around said support, a tubular connection upon said support and engaged by an intermediate of its ends for oscillating movement relative to the support, an oil container having a valve, and means operated by said oil applying member when oscillated in one direction to open the valve.

2. A hog oiler including a fixed support, a fulcrum on said support, a tubular oil applying member rotatable around said support and engaged intermediate of its ends upon the fulcrum for oscillatory movement relative to the support, a spring fixed to the support and co-acting with the oil applying member at one side of the fulcrum to yieldingly maintain the support in a normal position, an oil container having a valve, and a relatively movable element with which the oil applying member when oscillated and engaged with said element opens the same.

3. A hog oiler including [illegible] tubular oil applying member [illegible] rod, means on said rod [illegible] ment or out of contact [illegible] tion and liquid [illegible] therein when the [illegible] to the other [illegible] upon having [illegible]

[illegible]

Witnesses:

[illegible]